United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1059

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

:

-against- :

PAUL VIRUET, :

Appellant. :

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To be argued by
A. ISADORE EIBEL

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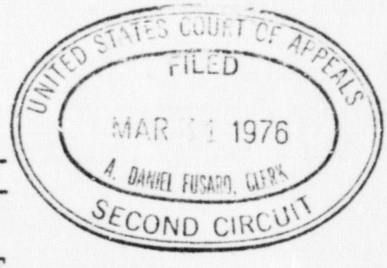
BRIEF FOR APPELLANT



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

PAUL VIRUET,

Appellant.

Appeal from a Judgment of Conviction of
the United States District Court for the
Southern District of New York

BRIEF FOR APPELLANT

ISSUES PRESENTED

I. Whether the verdict was against the weight of the evidence.

II. Whether the admission of "similar" acts was prejudicial error.

III. Where the jury had been deliberating almost six hours on an unexcepted charge that on the conspiracy count the Government must prove that the defendant knew the shipment was moving in interstate commerce, whether it was plain error and prejudicial to the defendant then to charge that such proof was unnecessary.

IV. Whether a conspiracy to hijack and fence an interstate truck shipment of men's suits is established by proof of the hijacking of an interstate truck shipment of hats, girdles, lamps and kids clothes.

PRELIMINARY STATEMENT *

Paul Viruet appeals from a judgment of conviction entered February 6, 1976, after a seven day trial before the Honorable Richard Owen, United States District Judge, and a Jury.

Indictment 75 Cr. 1003, filed October 25, 1974, charged Viruet in count 1 with conspiracy to hijack and fence an interstate shipment, in violation of Title 18, United States Code, Section 371, and in count 3 with receipt of the stolen shipment, in violation of Section 659. A superseding indictment, 75 Cr. 979, changing the commencement of the conspiracy from

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* Frank Cerell, Jr., charged with the same counts, also went to trial and was convicted on both, and is appealing from the judgment. Leon Rogers and Samuel (Buster) Eason pleaded guilty before trial to counts 1 and 2.

October 15,1971 to October 15, 1972, was filed October 25,1975.

Trial commenced December 10,1975 and concluded with the return of a verdict of guilty on both counts on December 18, 1975.

On February 6,1976 Judge Owen sentenced Viruet to a year and a day on both counts but suspended service of all but six months, and placing him on probation for the balance, subject to the standing probation order of the court. Bail was continued pending appeal.

STATEMENT OF THE FACTS

The Government's Case.

Theodore Smith, long time driver of Modern Trucking Company, loaded its M 711 truck at its premises, 554 W. 24th Street, Manhattan, on February 20, 1973 for delivery stops in New Jersey the next day (Tr. pp. 28-9,31). The cartons he took from a designated area and left on completing the loading and locking of the doors of the truck body about 4:30 P.M. (Tr. pp. 34,46, 60-1, 86). There were other sets of keys in addition to those he retained (Tr. pp. 61-2,84).

He returned next morning about 5:45 or 6:00 and cranked up and drove his truck away without inspecting its contents (Tr. pp.56, 60,88).

He went to Ninth Avenue, then down to 23rd Street, stopping for a red light. Two black men got in on either side of him, one driving to 22nd Street and into the middle of that block where a car and two more black men were waiting (Tr. pp. 34-6) was put into the car and driven around Manhattan by two of them, none of whom he knew or could describe (Tr. pp. 37,70,75). He was released in Harlem about 8:00 A.M. and called his employer (Tr. pp. 39,73,75,82-3).

Henry Hyman, president of Modern, who had not witnessed the loading on February 20, arrived at its premises the next morning at 7:00 and learned that the truck had left about 6:35 A.M. (Tr. pp. 94,96,109, 113-4). After Smith's call he notified the Safe and Loft Squad. The empty truck was recovered several days later in Jericho (Tr. pp. 97-8). He compiled a list of items on the truck from company records (Government Exhibit 5) (Tr. pp.103-4,107-8,114).

The hijacking, planned the night before, was executed by Chester Crawford, Carlton Boyd and James Dixon, un-indicted co-conspirators, with Samuel (Buster) Eason and Leon Rogers.

(Tr. pp. 118,125,221,398). Boyd and Eason after seizing the truck put Smith in a waiting car (Tr. pp. 119,129,231). The car drove off with Dixon and Rogers (Tr. pp. 324-5). Boyd and Eason then drove the truck downtown and across the Williamsburg Bridge, Crawford following in his car. Crawford left to make a telephone call in Brooklyn, telling them to continue along the Brooklyn Queens Expressway to the Long Island Expressway and he would catch up (Tr. pp. 119,232,445). Crawford called Viruet, returned to the expressway, and car and truck continued to the South Oyster Bay Road exit and then to Old Country Road. There they stopped at a diner, gas station or alongside a car waiting on the shoulder of the road at the corner of Exit 61 (or 43) (Tr. pp. 131,133, 240, 692,709,711-2). Crawford called (or did not call) Cerell who came out and met them and led them to his house where Viruet was (or Cerell and Viruet came to the diner together) (Tr. pp. 119-20, 133, 241, 325-6, 469, 503, 693).

Arriving at the house, 33 Belmont Avenue, Plainview, the truck was backed into the driveway and unloaded in a little 2 or 3 room house at the back of the main house, or detached shed 20 or 25 feet behind the house (Tr. pp. 134,248,326-7, 448, 477, 479, 695).

The contents of the truck, opened or unopened, were entirely unloaded in the small house, or in it and the basement, or 5 or 6 large cartons were left outside that house, or Crawford put some cartons in the trunk of his car (Tr. pp.134,250-6,331-2,449,477,480).

A money discussion ensued without payment (Tr. pp.137, 139,258-60,327-9). Boyd and Eason drove the truck onto South Oyster Bay Road leading to Jericho, abandoned it and rejoined Crawford in his car. They drove to the city. Just before the Midtown Tunnel Eason was let off at the place where he worked in Long Island City; Boyd was taken to 121st Street and Manhattan Avenue in Harlem, and Crawford continued on to a construction site in Brooklyn where he was filling in as foreman for a friend. Alternatively, after dropping Eason, Crawford and Boyd continued on to Crawford's house in St. Albans, remaining for half an hour, then drove together to Jersey where they spent some hours. They returned, starting for Crawford's house again, when Crawford called home and learned from his wife that Cerell had not called. They then turned around and went to 121st Street and Manhattan Avenue where Boyd left (Tr. pp. 138-9,262-4,449-50,480-2,492-6,696-7).

Crawford claimed he had been discussing a prospective hijacking with Viruet and Cerell in December, 1972, and January, 1973, asking them to get somebody to fence the load. They were unable to do so and finally said that when he got the load to call them. He called them from Brooklyn right after he got it. Then he added that he called them the night before February 21. They told him they would take the load and pay for it after it was sold. He never dealt with Cerell before that date, but had called Cerell's house many times before, between October, 1972 and January, 1973. Then he changed the period to 1973 because he did not know Cerell in October, 1972, and met him in November or December of that year. Then he said he made many calls to Cerell in November and December, 1972 (Tr. pp. 121,122-4,125,153,181,204).

Crawford did not call Viruet about hijacking in October, 1972, but in December. He was constantly calling Viruet and did so February 20 to say he would call the next morning before Viruet left (Tr. pp. 319-20).

Testimony of money payments enhanced the con sion. Crawford said that the next morning at 101st Street and Lefferts Boulevard, South Ozone Park, Cerell gave him $1000. to give to

the others, which he gave to Boyd to distribute at Manhattar Avenue and 121st Street. A few days later Cerell left $500 or $600 at his home which Crawford kept (Tr. pp. 140-3). Then he met Viruet at Huntington Station and added $200 to some money Viruet had to give Dixon and Boyd in New York (and they told him a few days later they received an unknown amount) (Tr. pp. 144,335).

Crawford then explained the payments as first $600 or $700 or $1000 given him by Cerell the next day at 101st Street and Lefferts Boulevard, $600 left at his house, and a small third payment of $50 or $100 that Cerell gave him personally (Tr. pp. 267-70).

Crawford conceded that in an interview on December 17, 1973 with Special Agents Lagator and Garber (Document 3508 of the 3500 received from the Government) he had stated that a day or two after the hijacking Cerell gave him $1000 to divide among the others and at a later date an additional $2800 to divide, the gross amount being $2800 (Tr. pp. 270-1). Then he said the first payment was $1000 for Boyd, Dixon, Eason and Rogers, and a second payment of $500 or $600. Then he changed the total from $2800 to $3800. Then he said the

correct amounts were $1000 and $2800, and finally that he could not remember the payments because it was so long ago (Tr. pp. 290-6).

Dixon thought he got a total of $1200. The first time Crawford brought $400 or $500 or $600 for each at Manhattan Avenue and 121st Street for Boyd to distribute, the second time about three weeks later or a week and a half later Paul brought $500 or $600 to them in a car at 125th Street and Broadway. He never saw this Paul again (Tr.pp. 404-6).

Boyd received his share on two occasions. The first on a Friday night at Sutphin and Linden Boulevards in Jamaica when Crawford gave him $1450. The next week on Saturday morning at 125th Street and Amsterdam Avenue [illegible] gave him $900 to split with Boyd, Eason and Rogers. (Tr. pp. 451-2, 484-6,496).

In pretrial discovery discussions the Government stated that from hijacking to unloading the period was from 6:00 to 10:00 A.M. In its Demand for Notice of Intention to Offer Alibi Defense served at the commencement of trial, the Government stated the unloading occurred between 7:00 and 8:15 A.M.

Crawford testified he saw Smith open the door at about 6:30 A.M. and he told the others Smith was on his way.(Tr.p.128).

He said the unloading took close to two hours (Tr. p. 123), then one hour and ten to fifteen minutes (Tr. p. 158), then one and a half to two hours (Tr. p. 159), then an hour and ten minutes to two hours, then an hour and a half, then forty-five minutes to an hour and a half or two. (Tr. pp. 249,257). He did not recall telling Mr. Reilly if the unloading occurred between 7:00 and 8:15 A.M. (Tr. pp. 235, 329).

Although decision was reserved on a defense request that the Government explain the basis for the computation of this period, the Court later excluded any use of the Notice with the erroneous statement that there was no foundation for its use as a statement of Crawford, with the further erroneous observation that he was never asked if he told the Government what the times were (Tr. pp. 237,299-9a).

In the pretrial discussions the Government stated it would rely on similar acts in its proof but refused any disclosure. No 3500 material was furnished to the defense concerning these acts.

The Government asserted that similar acts were admissible to show intent (Request to Charge No. 30), then stated at the trial they were to show common plan or practice. The Court

ruled that because the defense relied on examination tending to show that the truck could not have been driven the claimed distance in the stated period, the issue whether the fences were Viruet and Cerell is cemented by the fact of prior dealings, and allowed Crawford to testify as to earlier disposal of stolen merchandise to these defendants. Objection on the ground of prejudice was overruled and a motion for a mistrial denied. (Tr. pp. 146-9).

At the close of the Government's case the Court expanded the rationale for similar acts to common plan or scheme and denied a motion to strike the testimony and for a mistrial (Tr. pp.541-3). The Court later charged that the jury could consider the similar acts on the question whether Viruet engaged in a course of conduct to deal in stolen items and if they so found, on the fact of his connection with the hijacking charged in the indictment (Tr. pp. 892,912-3).

The similar acts with Viruet stated by Crawford involved providing him with stolen tablecloths in 1965, 1966 or 1967; over the years with bathing suits, panty hose, ladies wear, sportswear, wine in 1971 and dresses from the Speedmark hijack in 1972. Crawford said he purchased stolen wine from Boyd and

two others, 130 cases, and sold 30, 40 or 50 cases to Viruet for $6. a case, and Speedmark dresses for $600 or $800. (Tr. pp. 149-52).

Dixon and Boyd were in the Speedmark hijack with Crawford but neither mentioned any involvement of Viruet. (Tr. p. 19'). Boyd never mentioned any involvement of Viruet in the stolen wine case (Tr. p. 150).

Crawford said that in March, 1973 he bought two stolen certified checks from Cerell of the First National City Bank which were blank as to payee, amount and signature (sic) for $50 each, and added that he had conversations with Cerell and Viruet about buying a truckload of cigarettes with these stolen securities in North Carolina and bringing them back to New York. (Tr. pp. 153-5,272-5).

Crawford was arrested the first time on October 17,1972 by Special Agent Garber for the Merit Dress hijacking and made bail. He was arrested two days later for the Speedmark hijacking. He made bail and was again arrested by Garber in April, 1973 for the Postal truck hijacking in which a postal employee was murdered. He has been in jail since then (Tr.pp.282-5).

Crawford first spoke to Garber about the Modern hijacking in 1974. Document 3508 of the 3500 material showed the interview date as December 17,1973. <u>There was no mention of the Speedmark hijacking in it</u>. (Tr. pp. 287-9).

In a statement to Special Agent Kelly on April 5,1974 about the Speedmark hijacking (Document 3548 of the 3500 material) Crawford made no mention of Viruet (Tr. pp.301-4,339-41).

Boyd made no mention of Viruet in his first interview with Government agents on November 30,1973 (No. 3513 of the 3500 material). For almost a year, until he went before the grand jury and identified pictures of Cerell and Viruet, no agent questioned him about the Modern hijacking (Tr. pp. 488,491).

Special Agent Allen Garber, in charge of this case, testified that Boyd failed to mention Cerell and Viruet as the persons who received the load because he feared for his life (Tr. pp. 529-30). Boyd in lengthy testimony never mentioned any fear.

The identification of Viruet by Crawford and Boyd presents no problem because it is undisputed that they knew each other before February 21,1973. Dixon did not identify Viruet, stating that he never saw the Paul again who made a payment on account of the Modern hijack at 125th Street and Broadway. (Tr. p.406). Later reference will be made of Eason's failure to identify Viruet.

The criminal record of Crawford embraces a conviction for

interstate theft (Merit Dress) after trial with a sentence of 10 years and 3 years concurrent, a plea of guilty to murder in the second degree in the postal truck hijacking with a sentence of 12 1/2 years concurrent with the first sentence, a plea of guilty to possession of the stolen Speedmark merchandise with a sentence of 3 years concurrent, a plea of guilty to conspiracy in the District of New Jersey for which he had not yet been sentenced; granted immunity as an unindicted co-conspirator in the Modern trucking case with an understanding that his cooperation would be brought to the attention of the sentencing judge. He has testified in three of these cases. He had then served 31 months. (Tr. pp. 159-63, 184-91,285-6).

Boyd is serving a 5 year term for the Arrow hijack, having completed a 1 1/2 year term for the Merit Dress hijacking (reduced from 8 years), a sentence of 12 years for armed robbery, a 3 year sentence for robbery of mink skins on which he served 19 1/2 months. Although involved in about four hijackings between May,1972 and February,1973, he has not been prosecuted in any other hijacking, having been given immunity and in this case (Modern). His sentences of 26 years with concurrent and consecutive provisions reduce to 17 years of which 34 months have been served (Tr. pp. 438-41,453-7).

Boyd in return for immunity made statements and testified against other people to get favorable treatment and has no worries about prison in cases in which he testifies. He still has to testify in the Empire hijacking in Brooklyn and will not be jailed in that case. He testified before the grand jury in New Jersey and will not be prosecuted there. He was also told that when he goes before the Parole Board the attorneys in charge of his cases would advise of his cooperation and testimony for the Government (Tr. pp. 457-61,497-502).

Special Agents testified to the recovery of the Modern truck on February 23,1973, to the elapsed time in driving a Government car from the site of the hijacking to the Cerell house (61 minutes), the distance (33.6 miles), and the photographing of the Cerell house, the small house attached to its rear, and the grounds.

Defendant Viruet's Defense

Paul Viruet, 48, married and the father of four children, had been employed by City Cooling Corporation, an air conditioning service business in Long Island City, for about eight years in February,1973 as an air conditioning mechanic and shop steward. A company car was assigned to him and garaged at his

home in Holbrook,New York. He gassed it every morning at a Shell gas station in Holbrook on his way to work about 6:00 A.M. (Tr. pp. 714-5, 720,726, 732, 737, 747-9). It took him at least an hour and a half to drive in from Holbrook (Tr. p.749).

He worked a five day week from 8 to 4:30 or 9 to 5 going directly to City Cooling in Long Island City or directly to the buildings where the company had service contracts. The later starting time applied to buildings where earlier access could not be had. He would call in the starting times of his men and himself when he did not go to the plant first (Tr. pp.733-4, 747,767, 770).

Although Viruet did not know where he worked the week beginning February 19,1973, the company records showed that he did not work February 19, Washington's birthday, but did the remaining four days of the week and was paid for a full week (Tr. pp. 718-9,723, 748). He does not know where he worked those days and has no record of it (Tr. pp. 768-9). Defendant Viruet's Exhibit O are the gas receipts received for that week by the company.

Viruet first met Crawford in 1967 or 1968 in a restaurant on 21st Street and Broadway near a building where Viruet was working for his company. They met from time to time, visited

each other's homes, and discussed air conditioning matters and proposals. Crawford saw his name tag and the company name on his green work uniform. Crawford introduced him to Boyd at one of Crawford's buildings in Williamsburg where he had been asked to look at the air conditioning in the summer of 1971 or 1972. He sold Crawford a German Shepherd dog (Tr. pp. 738-43,746,750-1). He never saw Boyd again until the trial and last saw Crawford in 1971 or sometime in 1972 (Tr. pp. 745,757,758). He never saw Dixon or Eason before they testified (Tr. p. 752).

Viruet denied ever receiving any calls from Crawford about proposed or consummated hijackings. He never saw the truck in Government Exhibits 1 and 2. He did not see Crawford on February 21,1973. He denied the charges and making any purchases from Crawford (the"similar" acts testimony) or any conversations in connection with them. He denied ever giving Crawford money for himself or any one else (Tr. pp. 744-6,757). He denied being at Cerell's house February 21,1973 or seeing him that day (Tr. pp. 621,646-7,752).

Viruet had never been arrested before and never convicted of a crime (Tr. p. 753). Richard Waegerle, personnel

manager of Chemical Bank, and Walter Tenney, Jr., account manager of the sales department of New York Telephone Company, testified as character witnesses for him.

Mr. Reilly disclosed under Brady v. Maryland that Samuel (Buster) Eason had been shown a photographic spread containing Viruet's picture and another spread containing Cerell's picture and in each instance designated the wrong person as Paul (supposedly Viruet) and Frank (supposedly Cerell). Counsel for Viruet requested his production and called him to the stand (Tr. pp. 673-7).

The spread containing Viruet's picture (Defendant Viruet's Exhibits A to G, inclusive) was shown to him and he indicated Exhibit A as the one he said looked like the Paul involved in the hijacking. It was conceded that Exhibit B was a photograph of Viruet (Tr. pp. 680-3). The spread containing Cerell's picture (Exhibits H to M, inclusive) was shown to him and he indicated Exhibit H as the one who looked like the Frank who was to pay for the hijacked merchandise. It was conceded that Exhibit I was Cerell's photograph (Tr. pp. 684-5).

Eason pleaded guilty in October, 1975 and was interviewed by Mr. Reilly November 11,1975, a month before the trial began. (Tr. p. 679).

He saw the one the others in the hijacking referred to as Frank and the one they referred to as Paul at the unloading of the truck. He saw Paul uptown when he made a payment of money and was wearing a blue work uniform (Tr. pp. 689,691, 695-6, 697-8).

The Government did not ask Eason to identify anyone in the courtroom.

There was no rebuttal by the Government.

POINT I

PROOF OF AN AGREEMENT TO HIJACK AND DISPOSE OF A TRUCKLOAD OF MEN'S SUITS CANNOT SUSTAIN A CONSPIRACY CONVICTION WHERE THE HIJACKED TRUCK DID NOT CONTAIN MEN'S SUITS.

There was testimony that the hijackers, Crawford, Boyd, Dixon, Eason and Rogers met about two month s before February 21,1973 and agreed to hijack a Modern truck containing men's suits. Their discussions revealed that Crawford had followed Modern's driver, Smith, almost daily and knew the stops he made and the time he left the garage. From Crawford they

learned that two fellows on Long Island would buy that load, and they each expected $5,000. They made three or four attempts to seize the truck, and finally hijacked the Modern truck on February 21. On unloading it they found hats, girdles, lamps and kids clothes. They had failed to hijack the planned truckload of men's suits (Tr. pp. 121-3,395,423-5,442-4,449,488).

There was also testimony by Crawford that the two fellows on Long Island were Cerell and Viruet by reason of their identifications in court.

The conspiracy agreement had failed of its purpose. To convict Cerell and Viruet of conspiracy to hijack and dispose of a truckload of hats, girdles, lamps and kids clothes, the Government as a minimum had to prove that Cerell and Viruet had knowledge of and agreed to dispose of these items when they would have been hijacked. Absent such knowledge and agreement, a conspiracy conviction for hijacking and disposing of hats, girdles, lamps and kids clothes cannot stand. United States v. Gallishaw, 428 F.2d 760 (Second Circuit,1970).

It is undeniable that the indictment merely mentions a conspiracy to hijack and dispose of the contents of a Modern truck moving in interstate commerce. However, the proof fleshed

out the specificity of the criminal conduct, the hijacking of men's suits. To paraphrase Note 1 on page 763 (of 428 F.2d), Viruet had to know what criminal conduct was in fact contemplated. The proof was of a particular contemplated hijacking, not any hijacking, not even the hat, lamp, girdle, kid clothes hijack.

POINT II

ADMISSION OF CRAWFORD'S TESTIMONY OF SIMILAR TRANSACTIONS WITH VIRUET WAS REVERSIBLE ERROR.

It is difficult to ascertain the basis for the admission of testimony by Crawford of claimed similar transactions prior to the hijacking. The Government urged it to show a common pattern or practice whereby stolen merchandise is fenced by Crawford with Viruet. The court defined the basis as a prior course or practice tending to cement the fact that they had dealings, or common plan, or (as charged) that the jury may credit this testimony as a piece of evidence that the jury may consider whether the defendant is guilty of the crime charged, or consider it if credited only on the question whether the

defendant engaged in a course of conduct with Crawford to deal in stolen items, and only to the extent it bears on the fact of the defendant's connection with this particular hijacking (Tr. pp. 146-7,148,541-2, 868-9,891-2).

Before considering the applicable law it is necessary to review the specific similar acts. They are:

1. Viruet's purchase of stolen tablecloths from Crawford in 1965,1966 or 1967.

2. Viruet's purchase of bathing suits, panty hose, ladies wear, sportswear over the years.

3. Viruet's purchase of stolen wine which Crawford had purchased in 1971.

4. Viruet's purchase of dresses from the Speedmark hijack in 1972.

5. Discussion with Viruet and Cerell for using certified blank checks stolen from the First National City Bank to buy cigarettes in North Carolina in March,1973, aborted by Crawford's arrest in April, 1973.

Items 1,2,3 and 5 are notable for their freedom from particularity, specificity or substantiation. Item 4 was shown to be a recent fabrication (a month before the trial herein) with the evident purpose of serving as a vehicle for early release. None of them afforded Viruet an opportunity to defend save by mere denial.

The Government's reliance placed upon this Court's decision in United States v. Papadakis, 510 F. 2d 287 (2 Cir.1975), cert. den. 421 U.S. 950, 95 S. Ct. 1 32, was accepted by the court below. Overlooked were these significant portions of the opinion:

> "...The Government asserts that this evidenc was admissible to show that the appellant engaged in a pattern of conspiratorial criminal conduct, of which the more limited conspiracy to obstruct federal justice charged in the indictment was a part.
>
> This court has held that evidence of other criminal conduct is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value" (citing cases) (p. 294).
>
> - - - - - - -
>
> ..."Indeed, the evidence showed the existence among a group of S I U officers of a broader conspiracy to obstruct justice, of which the conspiracy charged against Novoa in count one of the indictment was only a part. United States v Cohen, 489 F. 2d 945, 949 (2 Cir. 1973).
>
> Further, at least one of the incidents that involved the arrest of Leguizamon at the Hotel Taft was directly connected with acts charged in the indictment, since it was related to the bribery negotiations over the ''100 Kilo case'. See United States v. Deaton, Supra, 381 F. 2d at 118." (p.295). (Emphasis supplied).

None of the similar acts mentioned by Crawford has any connection with the indictment herein, direct or otherwise.

In United States v Deaton, 381 F. 2d 114,118 (2 Cir.1967) it was observed that one of the transactions was part and parcel of the same transaction which constituted the offense charged, and another showed a similar contemporaneous pattern.

More recently in United States v Leonard, 524 F. 2d 1076 (2 Cir. 1975) this court felt that the weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an Appellate Court working from a written record simply cannot obtain. It further observed that it would have been wiser to have excluded the evidence, or, at the least to have excluded it until after the presentation of the defendant's case when there would have been a better opportunity to appraise the prosecution's need for it.

We would urge that the judge could not have a feel for the effect of the evidence when he shared the defense's ignorance of the similar acts at the time he ruled the prospective evidence admissible. We would also urge that the judge exceeded the bounds of discretion since he could not weigh without knowing what he was weighing. Admission subject to a motion to

strike irreparably damages the defendant.

If Rule 403 of the Federal Rules of Evidence is to have vitality the defendant must have an opportunity fairly to argue the danger of unfair prejudice which posits an obligation on the part of the Government to furnish particulars of the similar acts to counsel and court.

As to item 5, the cigarette-stolen blank certified check discussion, no transaction ever occurred and the testimony should not have been admitted. United States v Adams,385 F.2d 548 (2 Cir. 1967).

The admission of Crawford's similar act testimony, whatever the reason assigned, was in fact and effect an undeniable effort to prove criminal character.

The similar act testimony was also unnecessary (as well as prejudicial). United States v Byrd,352 F. 2d 570,575 (2 Cir.1965)

POINT III

THE SUPPLEMENTAL CHARGE ELIMINATING FROM THE CONSPIRACY COUNT THE REQUIREMENT THAT VIRUET KNOW THE SHIPMENT WAS INTERSTATE AS ORIGINALLY CHARGED WITHOUT EXCEPTION WAS IMPROPER, ERRONEOUS AND PREJUDICIAL.

After deliberating almost six hours the jury sent out a note asking whether the defendant on the conspiracy count had to know it was an interstate shipment. (Court Exhibit 4,Tr. p.931). The court had so stated in its charge without exception (Tr. pp. 887,895-6,919-20).

Mr. Reilly urged that United States v Feola, 420 U.S.671, 95 S. Ct. 1255 (decided March 19,1975) overruled United States v Crimmins, 123 F. 2d 271 (2 Cir.1941) and thereby eliminated the requirement that Viruet must be shown to have known the shipment was moving in interstate commerce. Considerable discussion ensued and the trial judge accepted the Government argument and in a supplemental charge instructed the jury that to convict on the conspiracy count it was not necessary to establish such knowledge (Tr. pp. 917,919-25,926,929-30,931-3). Thereafter the jury brought in its verdict.

In United States v. Feola, 420 U.S. 671,95 S. Ct. 1255, certiorari was granted to determine whether a conviction for conspiracy to violate 18 U.S.C. §111 required knowledge by the defendant that the persons assaulted were federal officers. This court had held the knowledge necessary, U.S. v. Alsondo, 486 F.2d 1339 (2 Cir. 1973).

The Supreme Court in an opinion by Justice Blackmun traced the history of the case. The defendants had been convicted of the conspiracy and substantive counts on a charge that scienter was not necessary for a conviction on either count. On appeal this Court held itself bound by United States v Crimmins. 123 F.2d 271 (2 Cir. 1941) and reversed the conspiracy count.

Justice Blackmun said that the purpose of the statute, §111, was two-fold: to protect federal officers and federal functions (at p. 679 of 420 U.S.) The substantive offense did not require awareness of the identity of the victim and was not therefore required for the conspiracy count to violate it. The holding, stated at pp. 694-5, is as follows:

> "We hold, then, that assault of a federal officer pursuant to an agreement to assault is not, even in the words of Judge Hand, "beyond the reasonable intendment of the common understanding". United States v.Crimmins, 123 F. 2d, at 273. The agreement is not

> thereby enlarged, for knowledge of the official identity of the victim is irrelevant to the essential nature of the agreement, entrance into which is made criminal by the law of conspiracy".

There is considerable discussion of Crimmins in the opinion and disagreement with its reasoning as inapplicable to §111, but nowhere does the Court state or imply that it is overruling Crimmins.

Preoccupation with dictum is not productive. In any event our concern is not limited to exegesis. The problem is both different and more profound. The Government and the trial judge may agree in their interpretation of the effect of Feola in conspiracies involving violations of statutes other than §111, but neither the Supreme Court, nor the Court of Appeals of this Circuit has held that scienter is unnecessary in conspiracies involving §659 designed to protect interstate commerce from theft.

While a supplemental instruction may be used to correct an error, it may not give or fail to give a proper instruction. Bland v United States,299 F. 2d 105 (5 Cir. 1962), or give one irreconcilable with the instructions originally given, or erroneous ones. Tennant v United States, 407 F. 2d 52 (9 Cir.1969).

It is urged that the supplemental instruction eliminating scienter on the conspiracy count should not have been given under the circumstances and there should be a new trial.

POINT IV

THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Government's case against Viruet rested solely on the testimony of Crawford and Boyd. Dixon and Eason did not identify Viruet although Eason had unloaded the truck with "Paul" and both claimed to have received money from "Paul".

Except for the unloading, all of Boyd's testimony about Viruet sets forth only what Crawford told him. Their accounts of the hijacking, unloading and events immediately following are in sharp conflict over significant details already pointed out. Their accounts of money payments are confusing, self-contradictory and vary with every recitation. Crawford's prior dealings with Viruet, the similar acts, are merely unsubstantiated, irrelevant accusations, albeit noxious.

Their testimony reveals in all their untrustworthiness their overpowering urge to escape punishment and obtain early release through sustained plea bargaining that has brought them incredibly light sentences for serious crimes including murder, immunity and expectation, not unjustified, of early release from incarceration. Their testimony reeks of falsehood and self-seeking to an extent that as matter of law they are unworthy of belief.

The only assessment fairly to be made is that the verdict against Viruet on their testimony is against the weight of the evidence.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED
AND A NEW TRIAL ORDERED.

Respectfully Submitted,

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